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No.

IN THE

Supreme Court of the United States

October Term, 1987

PHILIP COOMBE, JR.,

Petitioner,

– against –

ALEXANDER JENKINS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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72 pp

QUESTION PRESENTED

Can an ineffective assistance of appellate counsel claim be excused from evaluation under the two-part test in *Strickland* v. *Washington* by a judicial assessment that counsel, who presented the merits of the case, provided only "nominal" representation?

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Philip Coombe, Jr., Deputy Commissioner for Facility Operations of the New York State Department of Correctional Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the court of appeals is reported at 821 F.2d 158. It is reproduced in the appendix to the petition at 1a-8a.

The opinion of the district court is not reported. It is reproduced in the appendix at 9a-26a.

Jurisdiction

The Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1). The judgment was entered on June 17, 1987. Justice Marshall extended the time to file the petition first from September 15, 1987, to October 14 and then to November 1. Orders dated September 10 and October 6, 1987; 28 U.S.C. § 2101(c); Supreme Court Rules 12(2), 20(2), 29(2), (3).

Statement of the Case

A. Proceedings in the State Courts

Respondent Alexander Jenkins and Ronald Johnson were tried together in New York Supreme Court, Bronx County, for crimes related to a gunpoint robbery of a local supermarket and a subsequent exchange of gunfire with police. Appendix to the petition ("app.") at 2a, 3a, 10a. Both men were convicted of robbery in the second degree upon a jury verdict. *Id.* The respondent was sentenced, as a second felony offender, to an indeterminate term of six and one-half to thirteen years on December 3, 1979. *Id.* at 2a, 10a, 45a; New York Penal Law § 70.06(4). Johnson, also a second felony offender, received an identical sentence. App. at 3a, 10a, 27a.

The respondent and Johnson appealed from their convictions, as of right, to the Supreme Court, Appellate Division, First Department. App. 3a-4a, 10a-12a; New York Criminal Procedure Law §§ 450.10(1), 450.60(1). Johnson argued, by his assigned counsel, that the trial court had committed three errors: (1) denied a challenge for cause to a juror whose son was a police officer; (2) excluded two photographs of a deceased individual who, according to a defense witness, had confessed to the robbery; and (3) charged the jury that Johnson bore the burden of proof on his alibi defense. App. at 3a, 10a.

The appellate division reversed Johnson's conviction and ordered a new trial. *People* v. *Johnson*, 89 A.D. 2d 506

(1st Dep't 1982); app. at 27a, 28a, 30a-31a.[1] In a memorandum decision dated July 1, 1982, the court held that the rulings on the challenge for cause and the photographs and the jury charge on Johnson's ablibi defense "may" have been error and concluded that "[w]hile perhaps no one of the . . . [three] possible errors would warrant reversal, the cumulative effect requir[ed] a new trial." *Id.* at 28a. The presiding justice concurred in a separate memorandum, relying solely on the jury charge which, he found, improperly shifted the burden of proof to the defendant. *Id.* at 28a-29a.

On the respondent's appeal to the appellate division, his assigned counsel argued that the respondent's guilt had not been established beyond a reasonable doubt because the prosecution's identification evidence was not reliable. App. at 3a-4a, 11a.[2] Counsel's five-page brief cited discrep-

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[1] The memorandum decision and order of the Appellate Division, First Department in *People* v. *Johnson* is reproduced in the appendix at 27a-31a.

[2] The respondent had assigned counsel throughout his appellate division appeal. Contrary to the statement in the opinions below (app. at 4a, 7a, 11a), counsel was not relieved after he filed his brief. *Id.* at 32a-33a. Counsel did move to be relieved in June 1982, which was after he filed his brief (see *id.* at 44a), but the appellate division denied his application by order entered on July 15, 1982. *Id.* at 32a-33a. The court also denied counsel's earlier application for the same relief by order entered on December 9, 1980. *Id.* at 36a-37a.

The misstatement that the appellate counsel had been relieved appears initially in the memorandum (at 15) that the respondent's counsel in this case filed in the district court. The misstatement was not controverted by the Assistant Attorney General who then represented the petitioner.

The Assistant apparently believed that the misstatement was irrelevant because the respondent's counsel argued in the district court that his client had been ineffectively assisted, not unrepresented, on his appellate division appeal. App. at 12a. The pertinent discussion in the district court opinion is confined to the ineffective assistance issue (*id.* at 22a-25a), and the Assistant apparently believed that the court of appeals would not expand on it.

When the misstatement in the opinion of the court of appeals was called to the attention of the Solicitor General Division of the Attorney General's office, petitioner moved to recall the mandate, enlarge the time to petition for rehearing and reconsideration and, in the alternative, to amend the opinion to reflect the correct fact. The motion was filed on September 8, 1987, and remains *sub judice*. A supplemental petition will be filed if the court of appeals grants any relief.

ancies as to age, height, weight and facial appearance in the testimony of three prosecution witnesses and one defense witness (*id.* at 41a-43a) which, the brief urged, made the evidence identifying the respondent legally insufficient. *Id.* at 43a-44a. The brief relied on the authority of *People* v. *Whitmore*, 28 N.Y.2d 826 (1971), *cert. denied*, 405 U.S. 956 (1972), and *People* v. *Oyola*, 6 N.Y.2d 259 (1959). App. at 43a-44a. [3]

The respondent also argued, *pro se*, in a fifty-one page supplemental brief, that the trial court had committed the three errors advanced by Johnson on his successful appeal plus two others: the police had used suggestive identification procedures; and he had been denied effective assistance of appellate counsel. App. at 4a, 11a. [4] The portion of the supplemental brief arguing the three errors advanced by Johnson repeated the text of the brief filed by Johnson's counsel. *Id.* at 23a-24a.

The appellate division affirmed the respondent's conviction, and the New York Court of Appeals denied leave to appeal. *People* v. *Jenkins*, 91 A.D. 2d 557 (1st Dep't 1982), *lv. app. denied*, 58 N.Y.2d 975 (1983). [5] *See* New York Criminal Procedure Law § 450.90(1) (no appeal may be taken, as of right, from the affirmance of a conviction by the appellate division to the court of appeals).

In a memorandum decision dated December 16, 1982, the appellate division held that the "cumulative effect of [the three] possible errors which required a new trial" for Johnson did not affect the respondent's conviction. App. at 46a. The court first considered the two rulings raised by the

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[3] The brief by respondent's counsel to the Appellate Division, First Department is reproduced in the appendix at 38a-44a.

[4] After the respondent received his counsel's brief, he complained to the grievance committee of the bar association that he was inadequately represented and moved in the appellate division for permission to file a *pro se* brief. The court granted his application by order entered on July 15, 1982. App. at 34a-35a.

[5] The memorandum decision and order of the Appellate Division, First Department in *People* v. *Jenkins* is reproduced in the appendix at 45a-48a.

Johnson appeal, *i.e.*, the denial of the challenge for cause to the juror whose son was a police officer and the exclusion of the photographs of the deceased individual who allegedly had confessed to the robbery, and observed that the memorandum decision in *Johnson* identified the rulings only as " '*possible* errors.' " *Id.* (emphasis in the original). The court next considered the jury charge on the alibi defense which, the court observed, was the "most serious of the trial flaws" raised by the *Johnson* appeal, and found that the respondent could not have been affected by the charge since it did not apply to him. *Id.* The court last considered the two new assignments of error the respondent offered, *i.e.*, suggestive police identification procedures and denial of effective assistance of appellate counsel, and found both without merit. *Id.*

B. Proceedings in the Federal Courts

On April 20, 1983, the respondent, *pro se*, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Southern District of New York. App. at 4a-5a, 10a, 12a; district court docket entry 2. The respondent then was incarcerated at Eastern Correctional Facility, and the petitioner in this Court was the Superintendent of the prison. Petition for Habeas Corpus at 1.

The respondent made four claims in support of the writ: he had been deprived of a fair trial because the court denied the challenge for cause to the juror whose son was a police officer and excluded the two photographs of the deceased individual who allegedly had confessed to the robbery; [6] his

[6] In support of the writ, the respondent relied on the denial of three of his challenges for cause to prospective jurors who had some relationship to law enforcement activities. App. at 5a, 12-13a.

The district court found that the denial of only one of the challenges for cause, *i.e.*, to the juror whose son was a police officer, was in issue because the respondent had removed the two other prospective jurors by exercising peremptory challenges. App. at 14a.

The court of appeals did not consider the district court finding when it issued the opinion and judgment below (see App. at 5a, 6a-8a), and the petitioner relies on the finding here to confine the discussion to its appropriate limits.

guilt had not been established beyond a reasonable doubt because suggestive police procedures made the prosecution's identification evidence unreliable; and he had been denied effective assistance of appellate counsel because of the poor quality of his attorney's brief to the appellate division. *Id.* at 5a, 12a.

Counsel was appointed for the respondent on July 3, 1984. District court docket entry 11. The proceeding, thereafter, was submitted for decision on the transcripts of the hearing under *United States* v. *Wade*, 388 U.S. 218 (1967), the voir dire and the trial and on the exhibits and memoranda filed by counsel for both sides. App. at 26a n.1; district court docket entries 8, 9, 13.

1. Opinion of the District Court

The district court denied the writ of habeas corpus and dismissed the petition in an opinion and order, dated October 24, 1986, which considers the respondent's four claims in detail. App. 10a, 25a. The court held first, that the denial of the challenge for cause to the juror whose son was a police officer and the exclusion of the photographs of the deceased individual who allegedly had confessed to the robbery had not deprived the respondent of a fair trial. *Id.* at 12a-15a, 18a-22a.

According to the court, the denial of the challenge for cause did not satisfy the *Reynolds* test, which requires that " 'the nature and strength of the [juror's] opinion . . . raise the presumption of partiality.' " App. at 13a, quoting *Reynolds* v. *United States*, 98 U.S. 145, 156 (1878). The court gave two reasons for its "unhesitating[]" conclusion. App. at 15a. First, police officers and, *a fortiori*, their relatives are not presumptively partial jurors in criminal cases. *Id.* at 14a, citing, *inter alia, United States* v. *Wood*, 299 U.S. 123, 140 n.9 (1936). Second, the trial judge conducted an "especially thorough" voir dire of the challenged juror during which the juror did not give any indication that he could not render a verdict based solely on the evidence. App. at 14a, citing *Irwin* v. *Dowd*, 366 U.S. 717, 723 (1961); App. at 15a.

According to the court, the exclusion of the photographs did not satisfy the *Agurs* test, which requires that the excluded evidence " 'create[ ] reasonable doubt that did not otherwise exist' " in the trial record. App. at 20a, quoting *United States* v. *Agurs*, 427 U.S. 97, 112 (1976); App. at 21a. The court again gave two reasons for its conclusion which, it observed, was made after considering the entire trial record. *Id.* at 21a. First, the photographs, although erroneously excluded (*id.* at 20a), did not create reasonable doubt because the prosecution's case was "strong," *i.e.*, three eyewitnesses identified the respondent as one of the robbers, whereas the issue on which the photographs were offered, *i.e.*, the individual who died before trial and allegedly had confessed to the robbery fit the description of one of the robbers (*id.* at 18a-20a), related to a "weak" defense which, because of its convenience, " 'traditionally . . . met with skepticism.' " *Id.* at 21a, quoting *People* v. *Simon*, 75 A.D.2d 516 (1st Dep't 1980). Second, the exclusion of the photographs did not substantially interfere with the presentation of the defense because the trial judge allowed the respondent's counsel "a free hand" to elicit testimony. App. at 21a.

The district court held next, that the allegedly suggestive police procedures, *i.e.* a computerized photo reel, photo arrays and line-ups, had not made the prosecution's identification evidence against the respondent unreliable. App. at 15a-18a. According to the court, the discrepancy in testimony at the *Wade* hearing on which the respondent relied, *i.e.*, whether two eyewitnesses to the robbery initially identified him from the photo reel, as they said, or from photo arrays, as the police said (*id.* at 17a-18a), did not overcome the presumption in favor of the *Wade* finding that the procedures were not suggestive. *Id.* at 16a, citing *Sumner* v. *Mata*, 455 U.S. 591 (1982) (per curiam). Nor, the court added, did it find the discrepancy probative of suggestive procedures when it reviewed the entire *Wade* transcript. App. at 17a.

The court then ruled that even if the police procedures incorporated some suggestiveness, they would not satisfy the *Manson* test, which requires " 'substantial likelihood of

irreparable misidentification.' " App. at 16a, quoting *Manson* v. *Brathwaite*, 432 U.S. 98, 116 (1977), and *Simmons* v. *United States*, 390 U.S. 377, 384 (1968). As the court observed, an evaluation of the prosecution's identification evidence under the *Manson* factors, *e.g.*, the witnesses' opportunity to see the respondent, the accuracy and consistency of their descriptions, *see also Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972), required that the evidence be held reliable even if obtained through suggestive procedures. App. at 16a, 18a.

The district court held last, that the respondent had not been denied effective assistance of appellate counsel because of the poor quality of his attorney's brief to the appellate division. App. at 22a-25a. According to the court, the five-page brief the respondent's counsel filed satisfied the first part of the *Strickland* two-part test, which requires that counsel's performance be "deficient," *i.e.*, fall " ' outside of the wide range of professionally competent assistance.' " *Id.* at 22a, quoting *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984). But, according to the court, counsel's performance on the brief did not satisfy the second part of the *Strickland* test, which requires "prejudice[ ]" to the defendant, *i.e.* " 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " App. at 22a-23a, quoting *Strickland* v. *Washington*, 466 U.S. at 694.

The court gave several reasons for its conclusion that counsel's performance on the brief was deficient. App. at 23a. The brief, which the court styled as "clearly inadequate" (*id.* at 11a), "paltry" (*id.* at 22a) and "inexcusable" (*id.* at 23a), did not raise the denial of the challenge for cause to the juror whose son was a police officer or the exclusion of the photographs of the deceased individual who allegedly had confessed to the robbery, the two arguments the court found "by far the strongest" available to the respondent. *Id.* at 23a. The court then found that the argument the brief did raise, *i.e.*, the respondent's guilt had not been established beyond a reasonable doubt because discrepancies in the tes-

timony of four witnesses made the prosecution's identification evidence unreliable, was presented in too cursory a manner. *Id.*

The court gave three reasons for its conclusion that counsel's deficient performance did not prejudice the respondent. App. at 23a-25a. First, the respondent's *pro se* supplemental brief raised all of the colorable arguments that, on the court's own review of the trial transcript, the respondent could raise on appeal. *Id.* The court noted that the brief presented its two strongest arguments, *i.e.*, the denial of the challenge for cause and the exclusion of the photographs, with the effective assistance of counsel because the respondent had copied the arguments from the brief of counsel for the co-defendant. *Id.* at 23a-24a. Second, the appellate division memorandum decision on the appeal reflected that court's careful consideration of all of the issues the respondent raised. *Id.* at 24a. Third, there was no reasonable probability that if the respondent received professionally competent assistance of counsel, his conviction would have been reversed, rather than affirmed, on the appeal. *Id.* at 24a-25a.

On October 28, 1986, the district court entered a judgment on its opinion and order, denying the writ of habeas corpus and dismissing the petition. District court docket entry 15. The court also issued a certificate of probable cause. See app. at 2a, 25a.

2. Opinion of the Court of Appeals

The respondent appealed to the United States Court of Appeals for the Second Circuit from the district court judgment insofar as it denied the writ of habeas corpus and dismissed the petition on the ineffective assistance of appellate counsel claim. App. at 1a. In an opinion and judgment dated June 17, 1987, the court of appeals reversed the district court judgment on that claim and granted the writ unless, within ninety days, the New York Supreme Court, Appellate Division, First Department appointed appellate

counsel for the respondent and allowed the prosecution of a new appeal. *Id.* at 1a, 8a. [7]

The court, in its opinion, first identified the respondent's right, under *Douglas* v. *California*, 372 U.S. 353 (1963), to counsel on his original appeal to the appellate division and his right, under *Evitts* v. *Lucey*, 469 U.S. 387 (1985), to effective assistance of counsel on that appeal. App. at 6a. In its discussion of *Evitts*, the court observed that counsel's representation had been held "nominal" in that case because his failure to comply with a procedural rule had disabled him from placing the merits of his client's claims before an appellate court. 469 U.S. at 396; app. at 6a.

The court next identified *Strickland* v. *Washington*, 466 U.S. 668 (1984), as establishing the standard for evaluating effective assistance of counsel for the defense in criminal cases. App. at 6a-7a. The court acknowledged the two-part *Strickland* test and the district court findings that the performance of respondent's counsel in filing a "paltry" five-page brief (*id.* at 7a, 22a) was deficient under the first part of the test, *i.e.*, it fell below an objective standard of reasonableness, but was not prejudicial to the respondent under the second part of the test, *i.e.* there was no reasonable probability that, but for the deficient brief, the respondent's conviction would have been reversed on appeal. 466 U.S. at 688, 694; app. at 7a.

The court then held that the *Strickland* test did not apply to the respondent's ineffective assistance of appellate counsel claim and, as a result, conditionally granted the writ of habeas corpus without considering the type of assistance a more effective appellate counsel would have provided, the arguments he would have raised or the effect his perform-

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[7] The appellate division appointed new appellate counsel for the respondent, on the people's motion, by order entered on September 11, 1987. Order of the New York Supreme Court, Appellate Division, First Department in *People* v. *Jenkins* (Motion 3288). Counsel has not yet perfected the appeal, and as noted (p.3 n. 2), the petitioner has moved in the court of appeals to recall the mandate in this case.

ance would have had on the outcome of the respondent's appeal. App. at 7a, 8a.

The court gave three reasons for holding the two-part *Strickland* test inapplicable. App. at 7a-8a. First, the respondent had "no counsel" on his original appeal to the appellate division. *Id* at 7a.[8] Second, the respondent had only "nominal counsel" on his appeal. *Id.*[9] Third, the effective assistance of counsel the respondent had received on his appeal, *i.e.*, from incorporating three points from the brief by counsel for his co-defendant in his own *pro se* supplemental brief, was not a substitute for the effective assistance of his own counsel. *Id.* at 8a.

REASONS FOR GRANTING THE WRIT

The opinion and judgment of the court of appeals announces a new rule that requires the conviction of a criminal defendant to be vacated whenever a court finds that appellate counsel, who presented the merits of the defendant's case, provided only "nominal" representation. The rule conflicts with the two-part test this Court established in *Strickland* v. *Washington*, 466 U.S. 668 (1984), for evaluating ineffective assistance of counsel claims because it does not require prejudice to the defendant, or even performance below an objective standard of reasonableness by counsel.

The new rule also conflicts with the decisions in all of the circuits that have considered *Strickland's* application to ineffective assistance of appellate counsel claims, and, as the opinions of the district court and the court of appeals in this case illustrate, an analysis of the same facts under *Strickland* and under the rule yields irreconcilable results.

Moreover, if "nominal" representation is now the appropriate standard for evaluating the performance of appel-

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[8] As noted (p. 3 n. 2), the court's statement relies on its mistaken understanding that the respondent's counsel was relieved after he filed his brief when he was not. See app. at 4a, 7a, 32a-33a.

[9] The court did not define "nominal" other than by citation to *Evitts* v. *Lucey*, 469 U.S. at 396. App. at 7a.

late counsel for the defense in criminal cases, while *Strickland* remains the standard for evaluating the performance of trial counsel, this Court should grant review to inform the bar of the reasons for the nonuniform standards or to modify *Strickland.*

Strickland v. *Washington*, 466 U.S. 668 (1984), establishes a two-part test for evaluating sixth amendment ineffective assistance of counsel claims. Under the first part of the test, the criminal defendant must show that his counsel's performance was deficient, *i.e.*, fell below "an objective standard of reasonableness." *Id.* at 688. Under the second part of the test, the defendant must show that he was prejudiced, *i.e.*, there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. As this Court has observed, the policy and practical concerns that the *Strickland* test serves, fundamental fairness to the criminal defendant and avoiding undue burdens on the criminal justice system, requires uniform enforcement of both parts of the test. *Id.* at 696-700.

Until this case, all of the circuit courts of appeal that had considered ineffective assistance of appellate counsel claims in criminal cases applied the *Strickland* test.[10] Not one of the courts suggested that the *Strickland* test could be satisfied without a showing of both counsel's deficient performance and prejudice to the outcome of the defendant's appeal. *See Bell* v. *Lockhart, 795* F.2d 655 (8th Cir. 1986) (counsel's advice that defendant would face longer sentence if he prevailed on appeal held deficient under *Strickland*, and effect of advice examined to determine prejudice to the defendant) and cases collected at p.12 n.10. Not one of the courts suggested that the application of either part, or both

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[10]*Bell* v. *Lockhart*, 795 F.2d 655 (8th Cir. 1986); *McCrae* v. *Blackburn*, 793 F.2d 684 (5th Cir.), *cert. denied*, 107 S.Ct. 466 (1986); *United States* v. *Birtle*, 792 F.2d 846 (9th Cir. 1986); *Griffin* v. *West*, 791 F.2d 1578 (10th Cir. 1986); *Gray* v. *Greer*, 800 F.2d 644 (7th Cir. 1985); *Griffin* v. *Aiken*, 775 F.2d 1226 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 3301 (1986); *Mitchell* v. *Scully*, 746 F. 2d. 951 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 1765 (1985).

parts, of the *Strickland* test could be excused if counsel's representation was characterized as "nominal."

Departing from its own precedents, *e.g.*, *Mitchell* v. *Scully*, 746 F 2d. 951 (2d Cir. 1984), *cert. denied*, 105 S.Ct 1765 (1985); *Gulliver* v. *Dalsheim*, 739 F.2d 104 (2d Cir. 1984), the second circuit court of appeals held that the *Strickland* test did not apply to the respondent's ineffective assistance of appellate counsel claim because he was represented by only "nominal counsel." App. at 7a. In consequence, the respondent was held entitled to a new appeal, or release from prison, without any indicia that his counsel's "nominal" representation had affected the outcome of his appeal, that counsel who was not "nominal" would have provided other, or better, services and even without establishing that the services "nominal counsel" provided were professionally inadequate. See App. at 7a, 8a. [11]

The court of appeals committed plain error when it substituted a "nominal" representation rule for the *Strickland* test, error that is established by the only authority the court cited in support of the rule, *Evitts* v. *Lucey*, 469 U.S. 387, 396 (1985). App. at 7a. As the court's reference to *Evitts* discloses (app. at 6a), counsel in that case was termed "nominal" because his failure to comply with a state procedural requirement disabled him from placing the merits of

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[11]Petitioner assumes that the court of appeals, by applying the term "nominal counsel" to the respondent's counsel (App. at 7a),referred to the district court finding, mentioned in the preceding paragraph of the opinion, that counsel's performance in filing a five-page brief was deficient under the first part of the *Strickland* test.

However, given the failure of the court of appeals to define the term "nominal counsel," other than by an inapposite reference to *Evitts* v. *Lucey*, 469 U.S. 387, 396 (1985), see pp. 13–14, it is by no means clear that the court intended to confine the term to deficient representation, whether measured under the objective test of reasonableness in *Strickland*, 466 U.S. at 688, or under a more subjective test, determined case by case.

It is clear that the court of the appeals did not intend the term "nominal counsel" to mean "no counsel," since it employed both terms, and "no counsel" cannot be counsel, even in name only.

Lucey's claim before an appellate court. As a result, Lucey was completely deprived of due process of law on his appeal.

In contrast, counsel for the respondent in this case succeeded in placing the respondent's claims before the appellate division, thereby satisfying his right to due process of law. [12] That counsel filed a five-page main brief and no reply brief,[13] did not permit his representation to be characterized as "nominal" or ineffective. *See United States* v. *Birtle* 792 F.2d 846, 848 (9th Cir. 1986) (failure to file reply brief held not ineffective assistance of counsel if without prejudice to the defendant); *Morgan* v. *Zant*, 743 F.2d 775, 780 (11th Cir. 1984) (egregious conduct by counsel, including submission of a five-page brief after threat of sanctions, held not ineffective assistance of counsel because without prejudice to the defendant), *overruled in other respects, Peek* v. *Kemp*, 784 F.2d 1429 (11th Cir. 1986). Nor did counsel's inclusion of one issue to the exclusion of others, whether frivolous or nonfrivolous, permit his representation to be characterized as "nominal" or ineffective. *See Jones* v. *Barnes*, 463 U.S. 745 (1983); *People* v. *Vasquez*, 70 N.Y. 2d 1 (1987).

Because the "nominal" representation rule the court of appeals substituted for the *Strickland* test is without a prejudice component, it yields both impractical and unfair results. *See Strickland* v. *Washington*, 466 U.S. at 696-700. Con-

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[12] As noted (p. 3 n. 2), counsel for the respondent represented him throughout his appellate division appeal. However, even under the mistaken understanding of the court of appeals that counsel was relieved after he filed his brief (app.at 4a, 7a, 32a-33), *Evitts* would not justify the court of appeals' characterization of respondent's counsel as "nominal" or of his representation as "nominal."

Nominal representation in *Evitts* refers to the period when counsel was disabled from presenting Lucey's claims. 469 U.S. at 396. "Nominal counsel," as the court of appeals used the term in this case, refers to the period of time before the court thought counsel had been relieved, *i.e.*, from his appointment through the filing of his brief, when counsel succeeded in placing the respondent's claims before the appellate division. App. at 4a, 7a. See p. 13 n.11.

[13] The record is ambiguous on whether the respondent's counsel argued the case or marked it submitted. Compare app. at 38a *with id.* at 47a.

victed criminal defendants, whose representation by counsel may be characterized as "nominal" because it was deficient or for other reasons, see p.13 n.11, are entitled to new, counseled appeals even if their convictions are not likely to be reversed. The burdens on the criminal justice system and on the bar are thereby increased without corresponding benefit to the defendants.

But of more critical consequence, while both the two-part *Strickland* test and new "nominal" representation rule co-exist and are applied to evaluate the performance of counsel who has presented the merits of his client's case, they yield irreconcilable results on the same facts. A comparison between the results of the *Strickland* analyses followed by the district court in this case and the "nominal" representation analysis followed by the court of appeals demonstrates that the observation is correct.

Although, according to the record, the respondent's counsel performed but one service, *i.e.*, he filed a five-page brief, the result in the district court—no finding of ineffective assistance of counsel, and the result in the court of appeals—"nominal counsel" or ineffective assistance of counsel—are diametrically opposed.

The source of the opposing results is the district court's examination of the respondent's claim for prejudice (app. at 12a-22a; see pp. 6-9), and the court of appeals' excuse of the claim from that examination. App. at 8a. The opposing results are irreconcilable not only because they evaluate the same fact, counsel's performance on his brief, but because the court of appeals extended the respondent a right to a new appeal when, according to the district court, whose unappealed judgment on this point is law of the case, the respondent has raised all of the colorable appellate issues he has, both before the appellate division and before the district court. App. 12a-22a All were found insufficient to reverse his correction. *Id.*

If the petitioner is incorrect in claiming that court of appeals adopted the "nominal" representation rule in error,

the need for plenary review remains. Regardless of whether the "nominal" representation rule is confined to evaluating inffective assistance of appellate counsel claims in criminal cases, and the *Strickland* test is confined to evaluating ineffective assistance of trial counsel claims, or whether the rule and the *Strickland* test operate in tandem, the performance of counsel engaged in the same or similar professional activities will be subject to different standards without apparent need. Accordingly, the Court should inform the bar of the reasons for nonuniformity, *see Evitts* v. *Lucey*, 469 U.S. at 392; *Bell* v. *Lockhart*, 795 F.2d at 657 n.6, or if the "nominal" representation rule is correct, modify the *Strickland* test to conform with it.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted, and, upon plenary consideration, the judgment below should be vacated, and the case remanded for further proceedings consistent with *Strickland* v. *Washington*, 466 U.S. 668 (1984).

Dated: New York, New York
November 2, 1987

Respectfully submitted,

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APPENDIX

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 844-August Term, 1986
(Argued February 23, 1987 Decided June 17, 1987)
Docket No. 86-2420

ALEXANDER JENKINS,

Petitioner-Appellant,

-against-

PHILIP COOMBE, JR.,

Respondent-Appellee.

Before:

CARDAMONE and MINER, *Circuit Judges*, and POLLACK, *District Judge*.*

Appeal from a judgment of the United States District Court for the Southern District of New York (Conner, J.) denying appellant's petition for a writ of habeas corpus. The district court determined that appellant was not deprived of his sixth amendment right to the effective assistance of appellate counsel.

Reversed.

* Of the United States District Court for the Southern District of New York, sitting by designation.

(THOMAS F. LIOTTI, Carle Place, NY JOHN J. MARSHALL, JR., New York, NY, of counsel) *for Petitioner-Appellant.*

(ROBERT ABRAMS, Attorney General, MARYELLEN WEINBERG, FREDERICK S. COHEN, Assistant Attorneys General, New York, NY, of counsel) *for Respondent-Appellee.*

MINER, Circuit Judge:

Alexander Jenkins appeals from a judgment of the United States District Court for the Southern District of New York (Conner, J.) denying his petition for a writ of habeas corpus.

On December 3, 1979, Jenkins was sentenced to an indeterminate term of imprisonment of six and one-half to thirteen years, following his conviction upon a jury verdict for robbery in the second degree in the Supreme Court, Bronx County. The Appellate Division affirmed the conviction in a memorandum opinion, *People* v. *Jenkins*, 91 A.D.2d 557, 457 N.Y.S.2d 36 (1st Dep't 1982) (mem.), and the New York Court of Appeals denied leave to appeal, *People* v. *Jenkins*, 58 N.Y.2d 975; 460 N.Y.S.2d 1034 (1983).

Jenkins thereafter filed the instant petition for a writ of habeas corpus pursuant to the provisions of 28 U.S.C. § 2254. The writ was denied and the petition was dismissed by Judge Conner in an Opinion and Order, which included a certificate of probable cause, issued on October 24, 1986. Because we conclude that Jenkins was denied the effective assistance of counsel in connection with the prosecution of his appeal to the Appellate Division, we reverse and grant the writ conditionally.

BACKGROUND

The indictment against Jenkins and Ronald Johnson, his co-defendant, charged various crimes arising from the armed robbery of a Food City Supermarket in the Bronx and a subsequent exchange of gunfire with pursuing police officers. Specifically, each of the alleged participants was accused of attempted murder in the first degree, robbery in the first degree, and criminal possession of a weapon in the second degree. Both were convicted only of robbery in the second degree, and the sentences they received were identical—six and one-half to thirteen years.

Represented by assigned counsel on his appeal to the Appellate Division, Ronald Johnson asserted that there were three errors in his trial: (1) denial of a challenge for cause of a juror whose son was a police officer; (2) an erroneous jury instruction requiring him to bear the burden of proof as to his alibi defense; and (3) refusal of an evidentiary offer of two photographs of a person who purportedly had confessed to the crimes subject of the indictment. In directing a new trial for Johnson, the Appellate Division concluded that "[w]hile perhaps no one of the afore-mentioned possible errors would warrant a reversal, the cumulative effect requires a new trial." *People* v. *Johnson*, 89 A.D.2d 506, 506 [sic], 452 N.Y.S.2d 53, 54 (1st Dep't 1982). Concurring in the opinion, the Presiding Justice of the Appellate Division found it sufficient ground for the reversal "that the charge on the alibi defense improperly shifted the burden of proof to the defendant." *Id.*

The attorney originally assigned to represent Jenkins on appeal was relieved as counsel because of a conflict of interest arising from his representation of Johnson. The Court appointed another attorney to represent Jenkins, and that attorney moved to be relieved as appellate counsel approximately six months after his assignment to the case. The motion was denied, and the attorney thereafter filed what

was described by the District Court as "a clearly inadequate five-page brief." App. at 8. The brief contained but one Point, wherein it was argued that the evidence did not establish guilt beyond a reasonable doubt. The Point consisted of three paragraphs attacking the testimony identifying Johnson as a perpetrator.

After the brief was filed, Jenkins lodged a complaint against his attorney with a bar association grievance committee, whereupon the attorney moved to be relieved from the assigned representation. The application was granted, but the Appellate Division failed to appoint substitute counsel to pursue the appeal. Jenkins then filed a 51-page supplemental pro se brief in which he advanced the same three arguments that had proved successful for his co-defendant plus two others: employment of suggestive identification procedures and deprivation of effective assistance of appellate counsel.

In affirming Jenkins' conviction, the Appellate Division wrote the following:

> In the instant case, the burden-shifting alibi charge, the most serious of the trial flaws and the sole ground upon which one member of this court thought reversal of the codefendant's conviction was warranted, did not apply to appellant herein, and could not have affected his conviction. The cumulative effect of possible errors which required a new trial in *People* v. *Johnson*, *supra*, is thus absent in the present case. We have examined the remaining contentions raised by appellant and find them to be without merit.

Jenkins, 91 A.D.2d at 557, 457 N.Y.S.2d at 36-37. The motion for leave to appeal to the Court of Appeals was denied without opinion. *Jenkins*, 58 N.Y.2d 975, 460 N.Y.S.2d 1034.

Having exhausted his state judicial remedies, Jenkins filed a petition for a writ of habeas corpus in the Southern

District, asserting four grounds for relief: deprivation of a fair trial by reason of denial of challenges to three prospective jurors for cause; unreliable identification testimony, resulting in the failure of proof of guilt beyond a reasonable doubt; exclusion of a photograph of a person who purportedly had confessed to the crimes charged against Jenkins; and denial of effective assistance of appellate counsel. The District Judge rejected each of these contentions, holding that Jenkins was tried before a fair and impartial jury; that the identification procedures were not suggestive and, even if they were, there was sufficient independent proof of identification; that the trial court's error in excluding the proffered photographic evidence did not deprive Jenkins of a fair trial; and that Jenkins' appeal was not prejudiced by the deficient performance of his appellate counsel.

The District Court gave the following reasons for its finding that Jenkins suffered no prejudice by reason of inadequate representation:

> [I]n addition to his attorney's brief, Jenkins submitted to the Appellate Division a 51-page pro se supplemental brief. In this brief, Jenkins raised the three arguments that had won his co-defendant a reversal. The brief presented these points very skillfully; indeed, it appears that Jenkins copied these portions of his brief from his co-defendant's attorney's brief. Thus, with respect to what were probably his two strongest points on appeal, Jenkins had the benefit of effective assistance of counsel, even though it was not his own counsel.
>
> In addition, Jenkins supplemented the argument raised in his attorney's brief that the evidence did not establish his guilt beyond a reasonable doubt. He also argued that Ferrara's and Griffin's identification testimony was unreliable and that he had been denied effective assistance of appellate counsel. While these last two arguments were not as expertly presented as the points borrowed from Johnson's attorney's brief, they were reasonably articulate and contained citations to the

> relevant law. From my own review of the trial transcript, the supplemental brief appears to have raised all of the colorable issues Jenkins had on appeal. Thus, Jenkins, as a result of his own resourcefulness, avoided any prejudice that would have resulted from his appellate counsel's poor performance.

App. at 26.

On appeal, Jenkins argues only that he was denied the assistance of appellate counsel. We agree.

DISCUSSION

The fourteenth amendment affords a criminal defendant the right to counsel on a first appeal as of right from a judgment of conviction in a state court. *Douglas* v. *California*, 372 U.S. 353 (1963). Due process is offended if the attorney does not provide effective assistance for the appeal. *Evitts* v. *Lucey*, 469 U.S. 387, 396 (1985). In *Evitts*, an appeal filed with the Kentucky intermediate appellate court was dismissed as a consequence of the failure of retained counsel to comply with a procedural rule necessary to perfect a first appeal as of right. In affirming the grant of a writ of habeas corpus, the Supreme Court held:

> An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake. To be sure, respondent did have nominal representation when he brought this appeal. But nominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.

Id. at 396.

A standard of reasonably effective assistance has been established for the performance of the duties of counsel for

the defense in a criminal case. *Strickland* v. *Washington*, 466 U.S. 668, 688 (1984). To justify the reversal of a conviction on a claim of defective assistance, a convicted defendant must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness, *id*., and (2) a reasonable probability of a different result in the proceeding but for the errors of counel, *id*. at 694.

The district court applied the *Strickland* analysis in denying the writ in this case. Finding the brief submitted by Jenkins' appellate counsel "paltry," App. at 23, and "so deficient that it was inexcusable," *id*. at 25, the district court held the first prong of *Strickland* satisfied. The court also held, however, that there was no showing of prejudice and therefore no satisfaction of the second prong of the *Strickland* test, owing to Jenkins' "resourcefulness" in putting together a supplemental brief covering all the salient arguments that could be made on appeal. In the district court's view, the deficient work of Jenkins' attorney had no bearing on the outcome of the appeal.

We think that the *Strickland* test is inapplicable in the circumstances of this case because Jenkins had no counsel or, at best nominal counsel to represent his interests on the state appeal. *Evitts*, 469 U.S. at 396. The test makes sense only when a defendant has an attorney assigned or retained to take charge of his defense. Here, Jenkins' appointed attorney was removed before his appeal was submitted to the appellate court for decision, and no replacement ever was assigned. Jenkins thereupon was constrained to represent himself, despite the clear duty of the state court to afford him adequate and effective representation for his first appeal as of right. *Cf. Robinson* v. *Black*. 812 F.2d 1084 (8th Cir. 1987) (new appellate counsel required where *Anders* brief was inadequate to show favorable side of defendant's arguments).

It is not sufficient to say, as the district court did, that, by virtue of copying portions of the brief submitted by his co-defendant's attorney, "Jenkins had the benefit of effective assistance of counsel, even though it was not his own counsel." App. at 26. Although Jenkins was able to raise two points in addition to those successfully advanced by his co-defendant's counsel, it is quite possible that an attorney would have found other arguments or would have been more articulate in the presentation of the case on appeal. "[N]either a review of the record by the Appellate Division nor a *pro se* brief can substitute for the single-minded advocacy of appellate counsel." *People* v. *Casiano*, 67 N.Y.2d 906, 907, 492 N.E.2d 1224, 1225, 501 N.Y.S.2d 808, 808 [sic] (1986) (citation omitted).

It is not necessary, however, to speculate on the type of assistance that could have been provided by effective appellate counsel or on the possible outcome of the appeal had counsel advanced all possible arguments. It is sufficient for our determination of the instant appeal to say that there was constitutional error on the part of the state appellate court in undertaking to entertain Jenkins' appeal without providing him with effective appellate counsel.

CONCLUSION

The judgement of the district cout is reversed, with directions to grant the writ of habeas corpus unless, within ninety days, the Appellate Division, First Department, appoints appellate counsel and allows the prosecution of a new appeal.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALEXANDER JENKINS, *Petitioner,* *-against-* PHILIP COOMBE, JR., *Respondent.*	83 Civ. 3060 (WCC)

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CONNER, D.J.:

Petitioner Alexander Jenkins ("Jenkins") seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1982). For the reasons set forth below, the writ is denied and Jenkins' petition is dismissed.

BACKGROUND

In March 1979, a Bronx County grand jury charged Jenkins and Ronald Johnson with robbing a grocery store in the Bronx and shooting at two police officers who tried to apprehend them. The indictment contained two counts each of attempted murder in the first degree, robbery in the first degree, robbery in the second degree, and criminal possession of a weapon in the second degree.

Jenkins and Johnson were tried together before a jury sitting in the New York Supreme Court, Bronx County. The jury convicted both men of robbery in the second degree, but exonerated them of all of the other charges. On December 3, 1979, Justice Howard Goldfluss sentenced Jenkins to an indeterminate term of imprisonment of from six and one-half to thirteen years. Johnson received an identical sentence.

On appeal, the Appellate Division, First Department, reversed co-defendant Johnson's conviction. *People* v. *Johnson*, 89 A.D.2d 506, 452 N.Y.S.2d 53 (1st Dep't 1982) (mem.). Johnson had raised three issues on appeal: (1) that the trial court erred in denying a challenge for cause as to one of the jurors; (2) that the trial court's instructions on Johnson's alibi defense improperly shifted the burden of proof to the defendant; and (3) that the court erred in refusing to admit into evidence two photographs of an individual who, according to a defense witness, had confessed to the robbery in question. The Appellate Division ruled that all three of these points "may" have constituted error, and concluded that "[w]hile perhaps no one of the aforementioned

possible errors would warrant a reversal, the cumulative effect requires a new trial." *Id.* at 506, 452 N.Y.S.2d at 54. In a concurring opinion, Justice Thomas Murphy stated that he would reverse solely on the ground that the charge on Johnson's alibi defense improperly shifted the burden of proof to the defendant. *Id.* (Murphy, J., concurring).

Jenkins also appealed from his conviction. His appointed appellate counsel was David M. Klein of Suffern, New York. After Klein submitted a clearly inadequate five-page brief to the Appellate Division, Jenkins filed a complaint with the grievance committee of the bar association, and Klein moved to be relieved. The court granted the attorney's request, and permitted Jenkins to file a 51-page supplemental pro se brief. In that brief, Jenkins raised the three grounds his co-defendant had argued in his successful appeal. In addition, Jenkins argued that because the police employed suggestive procedures the identification testimony elicited at trial was unreliable. Finally, he contended that he had been deprived of effective assistance of appellate counsel.

The Appellate Division found that while the cumulative effect of the possible errors required a new trial for Jenkins' co-defendant, these circumstances did not warrant a reversal for Jenkins. *People* v. *Jenkins*, 91 A.D.2d 557, 457 N.Y.S.2d 36 (1st Dep't 1982) (mem.). The court stated:

> In the instant case, the burden shifting alibi charge, the most serious of the trial flaws and the sole ground upon which one menber of this court thought reversal of the co-defendant's conviction was warranted, did not apply to appellant herein, and could not have affected his conviction.
>
> The cumulative effect of possible errors which required a new trial in *People* v. *Johnson, supra,* is thus absent in the present case. We have examined the remaining contentions raised by appellant and find them to be without merit.

Id. at 557, 457 N.Y.S.2d at 36-37. On February 22, 1983, Judge Hugh R. Jones denied Jenkins leave to appeal to the Court of Appeals. 58 N.Y.2d 975, 460 N.Y.S.2d 1034 (1983).

As noted above, Jenkins now petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1982). In support of his petition, Jenkins asserts four grounds for relief: (1) that the trial court's denial of his challenges for cause with respect to three prospective jurors deprived him of a fair trial; (2) that the identification testimony against him was unreliable and failed to prove his guilt beyond a reasonable doubt; (3) that the trial court's refusal to allow him to introduce into evidence a photograph of a person who, according to a defense witness, had confessed to the crime deprived him of a fair trial; and (4) that Klein's poor brief on appeal denied him effective assistance of appellate counsel. There is no dispute that Jenkins has exhausted his state judicial remedies with respect to these claims. I shall address each claim in turn below.

1. Jury Selection

Jenkins' first contention is that the trial court erred when it denied his challenges for cause as to three prospective jurors. The three challenged veniremen were Benedict Antellni, who worked as a special welfare fraud investigator for the Department of Social Services; Elaine Ryder, whose son had taken the police examination and was waiting to be called; and Savatore Ranerie, whose son was an eight-year veteran of the police department. Jenkins challenged Antellni on the ground that he was essentially a law enforcement officer who might be biased in a case where police officers had been the alleged victims of an attempted murder and would be testifying at the trial. Jenkins challenged Ryder and Ranerie on the ground that they might be prejudiced for the same reasons since their sons were, or hoped to become, police officers. When the trial judge denied these

challenges for cause, Jenkins exercised peremptory challenges with respect to Antellni and Ryder. But by the time Ranerie had been called to sit in the jury box, Jenkins had exhausted all of his peremptory challenges, and Ranerie was impaneled as the twelfth juror.

Jenkins argues at some length that the trial judge's refusal to grant his challenges for cause violated section 270.20 (1) (c) of the New York Criminal Procedure Law, N.Y. Crim. Proc. Law § 270.20 (1) (c) (McKinney 1982). Whatever the merits of this argument, it is irrelevant here. A federal court may issue a writ of habeas corpus only to correct constitutional violations, not errors of state law. Of course, the sixth amendment guarantees a defendant in a criminal prosecution a right to a trial by an impartial jury, and this federal constitutional right is binding on the states through the due process clause of the fourteenth amendment. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). But the refusal to grant a challenge for cause is within the discretion of the trial court, and it does not provide a basis for habeas corpus relief unless the disqualifying fact was so prejudicial that the refusal deprived the petitioner of a fundamentally fair trial. *Sudds* v. *Maggio*, 696 F.2d 415, 416 (5th Cir. 1983) (per curiam). After reviewing the circumstances of this case, I cannot say that Jenkins was denied fundamental fairness.

The question of juror impartiality in a criminal trial presents a mixed question of law and fact, *Reynolds* v. *United States*, 98 U.S. 145, 156 (1878), and the applicable test is "whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality." *Id.; Mikus* v. *United States*, 433 F.2d 719, 723 (2d Cir. 1970). The Supreme Court has indicated that this is a difficult test to meet:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an

impossible standard. *It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.*

Irwin v. *Dowd*, 366 U.S. 717, 722-23 (1961) (emphasis added). By these standards, Jenkins' claim is clearly without merit.

First of all, only one of the three challenged prospective jurors, Ranerie, was actually placed on the jury. As noted above, Jenkins exercised peremptory challenges to remove Antellni and Ryder from the panel. Accordingly, it is difficult to see how Jenkins suffered any prejudice from the court's refusal to grant his challenges for cause as to them. Of course, the court's decision with respect to Antellni and Ryder required Jenkins to exhaust two peremptory challenges he might have used to strike other jurors from the panel. But Jenkins does not allege that, apart from Ranerie, any of the other jurors was biased against him.

Second, it is well settled that police officers are not deemed presumptively disqualified for jury service in criminal trials. *United States* v. *Wood*, 299 U.S. 123, 140 n.9 (1936); *United States* v. *Daly*, 716 F.2d 1499, 1507 (9th Cir. 1983), *cert. dismissed*, 465 U.S. 1075 (1984); *Mikus*, 433 F.2d at 724. Accordingly, Antellni was not barred from sitting on the jury simply because he worked in a law enforcement capacity for the Department of Social Services. Moreover, it is obvious that if police officers are not presumptively disqualified from jury service, prospective jurors are not disqualified merely because they are related to police officers. Consequently, Ryder and Ranerie also were not automatically suspect.

Finally, the transcript of the voir dire proceedings makes clear that the trial judge conducted a thorough examination of all of the prospective jurors to ensure that they were impartial, and that in response to these inquiries, the three individuals in question gave wholly satisfactory an-

swers. Antellni and Ryder both assured the court that they would not be biased against the defendants and that they would make their judgments solely on the basis of the evidence in the case. V 246-51; 271-77.1

The trial judge conducted an especially thorough examination of Ranerie, the only challenged venireman to sit on the jury. The judge asked Ranerie if he could give a definite promise that he would not mentally substitute his son for the police officers who were involved in this case. V 283. Ranerie stated that he could and would remain impartial and that his conduct would be governed by the evidence proffered at trial. V 281-83. After its interrogation, the court noted that it was aware of the "problems in questioning . . . the prospective juror and has come to the conclusion that the answers of this juror are honest, truthfully made in good faith and [has] no reason to believe that this juror is not telling the truth and not being frank in his answers." V 287. In the end, it appears that Ranerie kept his promise of impartiality since the jury acquitted Jenkins and Johnson of the charges that they had attempted to kill the two police officers who tried to apprehend them.

In view of these factors, I find Jenkins' claim of juror bias to be without merit, and unhesitatingly conclude that he was tried before a fair and impartial jury.

2. The Identification Testimony

Carlos Ferrera, the manager of the supermarket that was robbed, and Darryl Griffin, a security guard at the market, identified Jenkins and his co-defendant, Johnson, as the two perpetrators. Jenkins and Johnson made pretrial motions to suppress these identifications on the ground that they were the product of suggestive police procedures. The trial court held a *Wade* hearing, and concluded that the police did not employ improper techniques in obtaining the identifications. Consequently, Ferrara and Griffin were per-

mitted to make in-court identifications at trial. Jenkins argues here that this was error. I cannot agree.

The due process clause of the fourteenth amendment requires that eyewitness identification evidence be suppressed if suggestive identification procedures have led to a " 'very substantial likelihood of irreparable misidentification.' " *Manson* v. *Brathwaite*, 432 U.S. 98, 116 (1977) (quoting *Simmons* v. *United States*, 390 U.S. 377, 384 (1968)). The determination whether such eyewitness testimony should be suppressed rests on a balance between "the corrupting effect of the suggestive identification itself," and the weight of any indicia of reliability that may be present, including "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the [identification], [and] the time between the crime and the [identification]." *Id.* at 114 (citing *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972)) . Accordingly, the first issue is whether a suggestive identification procedure was employed. If the identification procedure is found to have been suggestive, then the "central question" becomes "whether under the 'totality of the circumstances,' the identification was reliable even though the [identification] procedure was suggestive." *Neil* v. *Biggers*, 409 U.S. 188, 199 (1972) (quoting *Stovall* v. *Denno*, 388 U.S. 293, 302 (1967)) .

At the close of the *Wade* hearing, the trial court found that the police had not used suggestive procedures in conducting the photographic arrays and in-person lineups at which Ferrera and Griffin made their identifications. H 302-04. The state court's findings of fact in this regard are, of course, entitled to a presumption of correctness. *Sumner* v. *Mata*, 455 U.S. 591, 597 (1982) (per curiam) ; *Sales* v. *Harris*, 675 F.2d 532, 538 (2d Cir.), *cert. denied*, 459 U.S. 876 (1982). Jenkins has failed to overcome that presumption.

Jenkins contends that if one compares the testimony given by Ferrera and Griffin and the testimony of Detective Edward Muller, the police officer in charge of investigating the case, it is obvious that the police used suggestive identification procedures. I have reviewed the entire transcript of the *Wade* hearing, and I cannot agree. So far as I can discern, there is one principal discrepancy between Ferrera's and Griffin's statements and Muller's testimony. The day after the robbery, Muller took Ferrera and Griffin to the police station to review photographs of potential suspects. The two witnesses reviewed trays of mugshots, as well as a reel of photographs in a computer-based system known as "CATCH." Ferrera testified that he first identified Jenkins from the reel of photographs on CATCH. H 141-42. Griffin testified that he looked at the photographs on CATCH, and that he identified Ronald Johnson from them. H 193.

Muller initially testified that his own notes indicated that Ferrera had identified Jenkins on CATCH. H 39. Later, however, he testified that police records maintained by the officer who operated the CATCH system indicated that Ferrera had viewed a reel of photographs on CATCH, but that he did not make any positive identification. H 248-49. In addition, he stated that the these records contained no entry that Griffin had ever viewed photographs on CATCH. H 273. There is no dispute that both Ferrera and Griffin later looked at photo arrays and in-person line-ups and picked out Jenkins and Johnson.

While the discrepancy about the CATCH system is certainly perplexing, it does not, unless one engages in wild speculation, indicate that the police used suggestive procedures. The state court, which could assess the demeanor and credibility of the witnesses in a way I cannot, came to the same conclusion:

> The Court would further find that both Ferreira [sic] and Griffin picked out each defendant from a photo array prepared by the police and the court would find that

> there was no undue suggestiveness in the composition of those photo arrays.
>
> The Court was disturbed with the testimony given by the Officer Muller as to what happened at the precinct at the time that the witnesses were there to view photos and to view the product of the catch system. The Court, I think, was as confused as the attorneys as to just what happened down there at the Bronx Photo Squad and with the catch operation. The testimony there is conflicting, inconsistent and the testimony of the police officers and the civilian witnesses at times were diametrically opposed. The Court however would find that there was no suggestiveness on the actions by the police officers and the civilian witnesses Ferreria [sic] and Griffin were not subjected to suggestiveness before the identification was made by them first through the photo arrays and then the lineup.

H 302-03. I see no reason to disturb that finding.

Moreover, even if there was some suggestiveness in the identification procedures, the state court found that both Ferrera and Griffin could independently identify Jenkins and Johnson. H 302. The court found that Ferrera and Griffin had "ample time to see" the defendants, *id.*, that their descriptions were "consistent with each other," *id.* at 303, and that the descriptions were "reasonably accurate," *id.* There was ample support for these findings in the record, and again I see no reason to disturb them.

Accordingly, I conclude that, given the totality of the circumstances, the identifications were reliable and that Jenkins is not entitled to habeas relief on this ground.

3. *The Exclusion of Defense Evidence*

As part of his defense, Jenkins called a friend, Nathan Ward, to testify at trial. Ward testified that on March 6, 1979, the evening the supermarket robbery at issue in this case took place, he met one Ronald Smith at a Manhattan

bar. Smith had been staying at Ward's apartment. Ward recalled that Smith told him that Smith and a person named "Butch" had attempted to "stick up a supermarket" and that the affair ended in "a shootout with the police." T 684, 699. After Smith indicated that he had changed his clothes in Ward's apartment, Ward told Smith that he would have to move out. T 699.

Later that evening, Ward returned home with a friend named Wendy to find the police at his apartment. He stated that the police confiscated a picture of Jenkins and two snorkel jackets, one belonging to Smith and the other belonging to "Butch." T 685-86. Griffin had testified that the robbers had worn such jackets during the robbery.

Ward testified that Smith had died three to four months before Jenkins' trial. Ward also stated that he had not seen Butch for about seven months, and that he did not know Butch's real name. T 693, 696. He did indicate, however, that he had advised the police of Smith's confession on the evening they seized the jackets at his apartment, although he could not remember what the officer he told looked like. T 706.

While Ward was on the witness stand, Jenkins' attorney attempted to introduce into evidence two photographs of Smith. The prosecutor objected, and the trial judge held a sidebar out of the hearing of the jury. Jenkins' counsel argued that the photographs were probative because Ward had identified Smith as one of the perpetrators of the robbery, and because the photographs demonstrated that Smith fit the description of one of the robbers. The court disagreed, and sustained the prosecution's objection. The judge stated that the photographs were "too speculative," noting that he was sure that one could find many photographs of persons who fit the descriptions of the robbers. T 688-91. Jenkins' attorney then asked Ward what Smith looked like on the evening of March 6, 1979. The prosecu-

tion again objected, and the court sustained that objection as well. T 691-92.

Jenkins argues here that the trial court's decision to exclude these photographs deprived him of an opportunity to present a full and complete defense. I think there is little doubt that the trial court committed an evidentiary error in excluding the photographs as "too speculative." As the Appellate Division noted in reversing Johnson's conviction, "the defense was not offering the photograph of just another who might fit the robber's description, but rather tried to introduce evidence of the appearance of a particular person already inculpated in sworn testimony." 89 A.D.2d at 506, 452 N.Y.S. 2d at 54.

However, an erroneous evidentiary ruling does not automatically rise to the level of constitutional error sufficient to warrant the issuance of a writ of habeas corpus. Rather, a federal court may issue a writ only where the petitioner can demonstrate that the error deprived him of a fundamentally fair trial. *See Chambers* v. *Mississippi*, 410 U. S. 284, 302-03 (1973); *Taylor* v. *Curry*, 708 F.2d 886, 891 (2d Cir.), *cert. denied*, 464 U.S. 1000 (1983).

As our court of appeals has noted,"[t]he concept of 'fundamental fairness' is sometimes an elusive one." *Id.* It has stated that "[w]here an erroneous evidentiary ruling is made, and relevant evidence is thereby excluded, the reviewing court's duty is to determine whether the excluded evidence was *material* to the presentation of the defense:

> "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. *It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.* This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt

> whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."

Id. (emphasis in original) (quoting *United States* v. *Agurs*, 427 U.S. 97, 112-13 (1976)).

Having considered the entire trial record, I am persuaded that the evidence excluded by the trial judge would not have created a reasonable doubt regarding Jenkins' guilt that did not otherwise exist. First of all, the prosecution's case against Jenkins was strong. Three eyewitnesses, Ferrera, Griffin, and another supermarket employee, Joe Caban, identified him at trial as one of the robbers. In contrast, Jenkins' defense that Smith had committed the crime was especially weak. At least one New York court has noted that this defense "has traditionally been met with skepticism." *People* v. *Simon*, 75 A.D.2d 516, 516 [sic], 426 N.Y.S.2d 753, 754 (1st Dep't 1980) (mem.), and for good reason. Such a defense is simply too convenient to be believed.

Most important, however, is that the trial judge's exclusion of the offered evidence did not substantially interfere with Jenkins' right to present his defense. Admittedly, the defense might have been more effective if Jenkins had been given the opportunity to demonstrate that Smith fit the description of one of the robbers. But the crux of the defense was that Smith, and not Jenkins, had robbed the supermarket, and the judge gave Jenkins' attorney a free hand to elicit testimony on that point from his witness. The judge permitted Ward to testify freely with respect to Smith's confession that he and Butch had robbed a supermarket and exchanged gunfire with police officers on March 6, 1979. This testimony presented the jury with the basic evidence essential to Jenkins' defense that Smith had committed the crime with which Jenkins had been charged.

Accordingly, I conclude that while the state trial court erred in excluding the evidence Jenkins' attorney sought to introduce, this error did not deprive Jenkins of a fundamentally fair trial. He is therefore not entitled to federal habeas relief on this ground.

4. Ineffective Assistance of Appellate Counsel

Jenkins' final claim is that he was deprived of effective assistance of appellate counsel. As noted above, his attorney submitted a paltry five-page brief in support of Jenkins' appeal to the Appellate Division. The brief raised only one argument, that the evidence did not establish Jenkins' guilt beyond a reasonable doubt, and contained only six sentences in support of its thesis. The entire substantive portion of the brief is set out in the margin below. [2]

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-part test for determining whether an attorney's service violated his client's sixth amendment right to effective assistance of counsel. First, the defendant must show that his counsel's conduct was deficient. *Id.* at 687. The central issue in this prong of the analysis is whether, in light of all of the circumstances, the attorney's conduct was "outside the wide range of professionally competent assistance." *Id.* at 690. In nearly all cases, counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.*

If the defendant succeeds in demonstrating that his attorney's conduct was deficient, he must show that the deficient performance prejudiced his defense. *Id.* at 687. It is not enough for the defendant to demonstrate that his attorney's errors had some conceivable effect on the outcome of the proceeding, for as the Supreme Court has noted, "[v]irtually every act or omission of counsel would meet that test." *Id.* at 693. Instead, the defendant must show that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Even when viewed with the requisite deference, there can be no doubt that Jenkins' claim meets the first prong of this test. The brief submitted by his attorney was so deficient that it was inexcusable. It completely failed to raise the two claims in co-defendant Johnson's brief that were applicable to Jenkins—whether the trial court had erred in refusing to grant challenges for cause as to three prospective jurors and in excluding photographic evidence that the defendants had sought to introduce in support of their contention that one Smith had committed the robbery in question. Counsel's failure to include these arguments can hardly be defended on the ground of strategy since they were by far the strongest arguments available. Moreover, the one argument counsel did include in his brief, that the evidence did not establish Jenkins' guilt beyond a reasonable doubt, was presented in such a cursory manner that it might as well have been omitted. Even the state has declined to defend the brief submitted by Jenkins' attorney to the "Appellate Division, stating that it is "difficult, if not impossible," to do so. Respondent's Memorandum of Law in Opposition to Petitioner's Application for a Writ of Habeas Corpus at 30.

However, I am not persuaded that Jenkins has satisfied the second, or "prejudice," prong of the *Strickland* test. As noted above, in addition to his attorney's brief, Jenkins submitted to the Appellate Division a 51-page pro se supplemental brief. In this brief, Jenkins raised the three arguments that had won his co-defendant a reversal. The brief presented these points very skillfully; indeed, it appears that Jenkins copied these portions of his brief from his co-defendant's attorney's brief. Thus, with respect to what were probably his two strongest points on appeal, Jenkins

had the benefit of effective assistance of counsel, even though it was not his own counsel.

In addition, Jenkins supplemented the argument raised in his attorney's brief that the evidence did not establish his guilt beyond a reasonable doubt. He also argued that Ferrera's and Griffin's identification testimony was unreliable and that he had been denied effective assistance of appellate counsel. While these last two arguments were not as expertly presented as the points borrowed from Johnson's attorney's brief, they were reasonably articulate and contained citations to the relevant law. From my own review of the trial transcript, the supplemental brief appears to have raised all of the colorable issues Jenkins had on appeal. Thus, Jenkins, as a result of his own resourcefulness, avoided any prejudice that would have resulted from his appellate counsel's poor performance.

Moreover, I believe it is important to note that the Appellate Division undoubtedly gave Jenkins' appeal serious and careful consideration. It was expressly conscious of the fact that it had reversed Jenkins' co-defendant's conviction on some of the same grounds Jenkins was arguing in his supplemental brief. Accordingly, I think it unlikely that the court discounted Jenkins' arguments simply because they were presented in a pro se brief and not authored by an attorney. Indeed, the Supreme Court has mandated that an "assessement of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Strickland*, 466 U.S. at 695. That assumption is fully warranted here; the Appellate Division's opinion affirming Jenkin's conviction reflects a careful consideration of the issues Jenkins had raised. I suspect that a capable attorney would have achieved no better result for Jenkins. In short, I cannot conclude there is a reasonable probability that , but for his counsel's unprofessional errors, Jenkins' conviction

would have been reversed. Jenkins is accordingly not entitled to relief on this ground either.

Conclusion

For the reasons set forth above, Jenkins' application for a writ of habeas corpus is denied and his petition is hereby dismissed. However, since the petition raised issues that may warrant appellate review, a certificate of probable cause will issue.

SO ORDERED.

s/ William C. Conner
United States District Judge

Dated: New York, New York
October 24, 1986

FOOTNOTES

1. "V' refers to the transcript of the voir dire proceeding; "H" refers to the transcript of the pretrial *Wade* hearing; and "T" refers to the transcript of the trial.

2. The Evidence Did Not Establish Guilt Beyond a Reasonable Doubt

In *People* v. *Oyola* 6 N.Y. 2d 259, 189 N.Y.S. 2d 203, the court of appeals defined the degree of proof for a reasonable doubt as follows:

> "The degree of proof required may be affected by whether the testimony is contradicted by other evidence, whether it is consistent, credible or contains elements of suspicion." 6 N.Y. 2d p.266. 189 N.Y.S. 2d p.209.

In this case, there was a very questionable identification of a non-active participant in a robbery. The defense produced a witness, Mr. Ward, who testified that a person other than the appellant robbed the store.

The testimony identifying appellant was inconclusive, there were facial discrepancies, age differences, height and weight differences and clothes differences. These types of discrepancies are insufficient to establish guilt beyond a reasonable doubt. *People* v. *Whitmore* 28 N.Y. 2d 826, 270 NE 2d 893 cert. den. 405 U.S. 956 (1972).

MEMORANDUM DECISION AND ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT IN *PEOPLE* v. *JOHNSON*

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

Murphy, P.J., Kupferman, Sandler, Fein, Asch, JJ. 14047

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent,* *-against-* RONALD JOHNSON, *Defendant-Appellant.*	[Memorandum Decision]

R.L. SHEPHERD *[for Respondent]*

A.S. AXELROD *[for Defendant-Appellant]*

Judgment, Supreme Court, Bronx County (Goldfluss, J.) rendered on January 11, 1981, convicting defendant upon a jury verdict of robbery in the second degree, and resentencing him on March 19, 1981, as a second felony offender to a term of 6½ to 13 years, reversed on the law, the facts and as a matter of discretion in the interest of justice and the matter remanded for a new trial.

The defendant and a co-defendant were indicted in a supermarket robbery. The robbers were pursued by the police and fired at the officers who returned the fire. The robbers escaped on foot, but the defendant Johnson, the driver of the unused getaway car, was apprehended.

The significance of the shooting at the police officers is apparent in the fact that a challenge for cause was denied to the defendant for a juror whose son was then a police officer, said juror being seated because the defendant had exhausted his peremptory challenges. Under the circumstances, there could have been an implied bias, and the failure to exclude that juror may be considered error.

The defendant's parents testified that the defendant had spent the day in question at home with them, and his young niece claimed to have talked to him on the telephone at home on the evening in question. The charge to the jury stated "you must be satisfied as to the truth of the alibi." While the usual explanation of guilt beyond a reasonable doubt charge was also given, this, too, may be considered error.

Further, evidence was introduced to show that a friend of the co-defendant had known one Smith, deceased prior to the trial, who confessed to the friend shortly after the robbery that Smith and another had attempted a robbery at a supermarket near the friend's home, and that there had been a shootout with the police. The defendant offered in evidence two photographs of the said confessor, which were excluded as "too speculative." However, the defense was not offering the photograph of just another who might fit the robber's description, but rather tried to introduce evidence of the appearance of a particular person already inculpated in sworn testimony. This, too, may have been error.

While perhaps no one of the aforementioned possible errors would warrant a reversal, the cumulative effect requires a new trial.

All concur except Murphy, P.J. who concurs in a memorandum as follows:

I would reverse on the sole ground that the charge on the alibi defense improperly shifted the burden of proof to the defendant (*People* v. *Acevedo*, 83 A D 2d 813). I do not

find that, as a matter of law, the trial court abused its discretion in permitting Mr. Ramerie [sic] to be seated as the twelfth juror.

Order filed.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, On July, 1 1982.

Present—Hon.
FRANCIS T. MURPHY, JR., Justice Presiding,
THEODORE R. KUPFERMAN,
LEONARD H. SANDLER,
ARNOLD L. FEIN,
SIDNEY H. ASCH, Justices.

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent,* *-against-* RONALD JOHNSON, *Defendant-Appellant.*	[Order] 14047

An appeal having been taken to this Court by the above-named appellant from a judgment of resentence of the Supreme Court, Bronx County (Goldfluss, J.), rendered on March 19, 1981, convicting defendant of robbery in the second degree,

And said appeal having been argued by Alan S. Axelrod of counsel for appellant, and by Robert L. Shepherd of counsel for respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same hereby is reversed on the law,

the facts and as a matter of discretion in the interest of justice and the matter remanded for a new trial. [Murphy, P.J., concurs in a separate memorandum.]

ENTER:

s/Joseph J. Lucchi
Clerk

ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT IN *PEOPLE* v. *JENKINS* (MOTION 3255)

At a term of the Appellate Division of the Supreme Court held in and for the first Judicial Department in the County of New York, On July 15, 1982.

Present—Hon.
FRANCIS T. MURPHY, JR., Presiding Justice,
LEONARD H. SANDLER,
JOHN CARRO,
SIDNEY H. ASCH,
E. LEO MILONAS, Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ALEXANDER JENKINS,

Defendant-Appellant.

M-3255
Ind. No. 667/79

An appeal having been taken by the defendant-appellant from the judgment of the Supreme Court, Bronx County, rendered on December 3, 1979, and David M. Klein, Esq. having been assigned for purposes of prosecuting the appeal, and said counsel having moved to be relieved from such assignment, and for other relief,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support

of said motion and the papers filed in opposition or in relation thereto, and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied. (See M-3178, decided simultaneously herewith.)

ENTER:

[initials illegible]
Deputy Clerk

ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT IN *PEOPLE* v. *JENKINS* (MOTION 3178)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, On July 15, 1982.

Present—Hon.
FRANCIS T. MURPHY, JR., Presiding Justice,
LEONARD H. SANDLER,
JOHN CARRO,
SIDNEY H. ASCH,
E. LEO MILONAS, Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ALEXANDER JENKINS,

Defendant-Appellant.

M-3178
Ind. No. 667/79

The above-named defendant-appellant, in connection with his appeal from a judgment of the Supreme Court, Bronx County, rendered on December 3, 1979, having moved this Court for a copy of the trial transcript in order to prepare his supplemental *pro se* brief,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion and the papers filed in opposition or in relation thereto, and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is granted insofar as to direct the Clerk to forward a transcript of the minutes relating to appellant's appeal to the Warden of the State Correctional Facility at Napanoch, New York 12458, to be made available to appellant and returned to this Court when appellant's supplemental brief is forwarded to this Court. Appellant is directed to serve and file his supplemental brief on or before September 13, 1982 for the November 1982 Term of this Court, to which Term argument of the appeal is hereby adjourned. Argument of the appeal will not be heard until all material forwarded to the appellant has been returned to the Clerk of this Court. (See M-3255, decided simultaneously herewith.)

ENTER:

[initials illegible]
Deputy Clerk

ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT IN *PEOPLE* v. *JENKINS* (MOTION 4474)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, On December 9, 1980.

Present—Hon.
THEODORE R. KUPFERMAN, Justice Presiding,
HAROLD BIRNS,
ARNOLD L. FEIN,
LEONARD H. SANDLER,
VINCENT A. LUPIANO, Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ALEXANDER JENKINS,

Defendant-Appellant.

M-4474

Ind. No. 667/79

An order of this Court having been made and entered on April 10, 1980 granting defendant-appellant's motion for leave to prosecute, as a poor person, his appeal from the judgment of the Supreme Court, Bronx County, rendered on December 3, 1979 and assigning David M. Klein, Esq., as counsel for purposes of the appeal; and said counsel having moved to be relieved of such assignment,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support

of said motion and no papers having been filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied.

ENTER:

s/Joseph J. Lucchi
Clerk

BRIEF FOR DEFENDANT-APPELLANT JENKINS TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

To be submitted
DAVID M. KLEIN, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-versus-

ALEXANDER JENKINS,

Defendant-Appellant.

APPELLANT'S BRIEF ON APPEAL

DAVID M. KLEIN, Esq.
Attorney for Appellant
One Lafayette Avenue
P.O. Box 87
Suffern, New York 10901

TO: HON. MARIO MEROLA
District Attorney Bronx County
215 East 161st Street
Bronx, New York 10451
(212) 590-3800
Attorney for Respondent

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[1]

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, [*Respondent*], *-versus-* ALEXANDER JENKINS, *Defendant-[Appellant]*.	Statement Pursuant To CPLR 5531

1. The indictment number of the case above is 667/79 and number M-921.

2. The full names of the original parties are People of the State of New York, plaintiff, against Alexander Jenkins and Ronald Johnson, defendants. There has been no change in the parties.

3. The action was commenced in the Supreme Court, Bronx County.

4. The action was commenced on or about January 8, 1979 by the filing of a criminal indictment.

5. The nature and object of the action was a criminal prosecution for attempted murder in the first degree (two counts), one count of robbery in the first degree, robbery in the second degree an criminal possession of a weapon in the second degree.

6. The appeal is from a judgment of Hon. Howard Goldfuss, Justice of the Supreme Court, sentencing defendant to an indeterminate term having a minimum of six years and a maximum of thirteen years after jury acquitted the

defendant of attempted murder in the first degree, robbery in the first degree and possesion of a weapon in the second degree and convicted him of only robbery in the second degree.

[2]

PRELIMINARY STATEMENT

Alexander Jenkins was indicted for robbery in the first degree, two counts of attempted murder in the first degree and was convicted after a jury trial of robbery in the second degree and acquitted of all other charges.

The defendant was sentenced to an indeterminate sentence, the maximum of which was thirteen years and the minimum which was six and a half years.

The defense was lack of identification beyond a reasonable doubt.

FACTS OF CASE

This case involved the identification of the defendant. The prosecution identification witnesses testified as follows:

CARLOS FERRERA

Mr. Ferrera was an employee of Food City Supermarkets, the place which was allegedly robbed (p.77). He testified that a man with a gun came up to him and told him to put money into a bag (p.78). The man with the gun identified as Ronald Johnson was described as being about 6 feet, 200 lbs. (p.101). He stated that the robber had a snorkel jacket on.

The other alleged participant in the robbery was said to be at a far distance near a window (p.85). The second participant allegedly stated "Don't be greedy, let's go." (p.85). He was described as 5'8" and 170 lbs. with a goatee, mus-

tache and sideburns. (p.86). The witness could not remember what he was wearing (p.87). Throughout the entire incident, this man identified as appellant, Jenkins, was near the distant window (p.103).

The description of Johnson was questionable since he estimated his age to be 45 years old, when in reality he was 28 or 29 years old (p.113).

Mr. Ferrera claimed to have picked Mr. Jenkins out of computer "catch system;" the catch system did not contain Mr. Jenkins' picture. (p.443).

[3]

DARRYL GRIFFIN

Mr. Griffin was a security guard at the Food City store on March 6, 1979, the date of the robbery. Mr. Griffin testified that he was not really looking at the participant of the robbery prior to the actual incident (p.161). Mr. Griffin admitted that the lighting conditions in the room were extremely poor and that he had never seen the appellant before (p.164). Mr. Griffin never viewed the appellant in a line up (pp.165-167). Mr. Griffin testified that the shorter man definitely had sideburns (p.203).

JOE CABAN

Mr. Caban is another employee of Food City. Mr. Caban had the good fortune of being in the basement of the store when the actual robbery occurred (pp.268-269). This witness claimed to have given a statement to an assistant district attorney (p.272). Mr. Caban claimed that notes of the statement were taken by the assistant district attorney (p.272). These notes did not exist at the time of trial (p.272). The notes allegedly contained a description of patrons of the store prior to the robbery. On cross-examination, Mr. Caban admitted being 20-25 feet away from the appellant

prior to the robbery (p.277). Mr. Caban also stated that the clothes which the prosecutor tried to connect to Mr. Jenkins were not the color of the clothes worn by the person he believed to be the perpetrator.

There were numerous defense witnesses who testified on behalf of appellant:

CLARICE CHISOLM

Ms. Chisolm was Mr. Jenkins' girl friend. She saw him five times a week. She testified that he had never had sideburns and was clean shaven (p.641).

[4]

NATHAN WARD

Mr. Ward stated that a friend, Ronald Smith, told him that on March 6, 1979, he had tried to stick up the Food City Supermarket (p.684). He also stated that a snorkel jacket which the prosecution tried to tie with the co-defendant belonged to Ronald Smith.

QUESTIONS PRESENTED

Was guilt established beyond a reasonable doubt despite the unclear identification evidence?

Answer [in the trial court]: Yes.

POINT ONE

The Evidence Did Not Establish Guilt Beyond a Reasonable Doubt

In *People* v. *Oyola* 6 N.Y. 2d 259, 189 N.Y.S. 2d 203, the court of appeals defined the degree of proof for a reasonable doubt as follows:

"The degree of proof required may be affected by whether the testimony is contradicted by other evidence, whether it is consistent, credible or contains elements of suspicion." 6 N.Y. 2d p.266, 189 N.Y.S. 2d p.209.

In this case, there was a very questionable identification of a non-active participant in a robbery. The defense produced a witness, Mr. Ward, who testified that a person other that the appellant robbed the store.

The testimony identifying appellant was inconclusive, there were facial discrepancies, age differences, height and weight differences and clothes differences. These types of discrepancies are insufficient to establish guilt beyond a reasonable doubt. *People* v. *Whitmore*, 28 N.Y. 2d 826, 270 N.E. 2d 893 *cert. den.* 405 U.S. 956 (1972).

[5]

CONCLUSION

For the above stated reasons, the judgment of conviction should be reversed.

Dated: Suffern, New York
May 21, 1982

Respectfully submitted,

DAVID M. KLEIN
Attorney for Appellant

MEMORANDUM DECISION AND ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT IN *PEOPLE* v. *JENKINS*

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

Sullivan, J.P., Ross, Carro, Asch, Milonas, JJ. 15075

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ALEXANDER JENKINS,

Defendant-Appellant.

[Memorandum Decision]

R.L. SHEPHERD [*for Respondent*]

D.M. KLEIN [*for Defendant-Appellant*]

Judgment, Supreme Court, Bronx County (Goldfluss, J.), rendered December 3, 1979, convicting defendant upon a jury verdict of robbery in the second degree, and sentencing him as a second felony offender to a term of 6½ to 13 years, affirmed.

Defendant and co-defendant Ronald Johnson were indicted for a supermarket robbery which involved a pursuit by the police and an exchange of gunfire between the police officers and the robbers.

This court reversed the conviction of co-defendant Ronald Johnson (*People* v. *Ronald Johnson*, ____A D 2d ____; 452 N.Y.S. 2d 53), the majority finding that failure to exclude a juror "may be considered error" where a chal-

lenge for cause directed against a juror whose son was a police officer was denied.

In addition, the majority concluded that the exclusion by the court of photographic evidence offered by defendant of one Smith, a deceased individual who allegedly confessed to perpetration of the same crime also "may have been error".

The third factor relied on by the Court in *People* v. *Johnson*, *supra*, was that the charge shifted the burden of proof as to the alibi defense offered by the co-defendant.

In *Johnson*, the cumulative effect of the errors was held to require a new trial, even though no one of the "*possible* errors would warrant a reversal" (emphasis added). In addition, one Justice concurred "on the sole ground that the charge on the alibi defense improperly shifted the burden of proof to the defendant" *(People* v. *Johnson*, *supra,* Murphy, P.J. concurring).

In the instant case, the burden shifting alibi charge, the most serious of the trial flaws and the sole ground upon which one member of this court thought reversal of the co-defendant's conviction was warranted, did not apply to appellant herein, and could not have affected his conviction.

The cumulative effect of possible errors which required a new trial in *People* v. *Johnson*, *supra,* is thus absent in the present case. We have examined the remaining contentions raised by appellant and find them to be without merit.

All concur.

Order filed.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, On December 16, 1982.

Present—Hon.
JOSEPH P. SULLIVAN, Justice Presiding,
DAVID ROSS,
JOHN CARRO,
SIDNEY H. ASCH,
E. LEO MILONAS, Justices.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

ALEXANDER JENKINS,
Defendant-Appellant.

Order of Affirmance on Appeal from Judgment 15075

An appeal having been taken to this Court by the defendant appellant from the judgment of the Supreme Court, Bronx County (Goldfluss, J.), rendered on December 3, 1979, convicting defendant of robbery in the second degree, and said appeal having been argued by Mr. David M. Klein of counsel for the appellant, and by Mr. Robert L. Shepherd of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

s/Joseph J. Lucchi
Clerk